

OPEN MEETING ITEM



0000071312

BEFORE THE ARIZONA CORPORATION COMMISSION

RENZ D. JENNINGS
Chairman

Arizona Corporation Commission

DOCKETED

MARCIA WEEKS
Commissioner

DEC 20 1996

CARL J. KUNASEK
Commissioner

DOCKETED BY

[Signature]

IN THE MATTER OF COMPETITION
IN THE PROVISION OF ELECTRIC
SERVICES THROUGHOUT THE
STATE OF ARIZONA

DOCKET NO. U-0000-94-165

EXCEPTIONS OF ARIZONA PUBLIC SERVICE COMPANY
TO STAFF'S PROPOSED ORDER

Arizona Public Service Company ("APS" or the "Company") favors competition in the electric industry as a means to increase economic efficiency and to provide greater opportunities for both utilities and utility customers. APS supports a thorough and disciplined approach to deregulation that considers the economic, financial, operational and system reliability effects of restructuring. The ultimate goal should be that all customers must benefit.

However, despite the significant comments demonstrating the deficiencies in the proposed electric competition rules (the "Proposed Rules") adopted in Decision No. 59870 (October 10, 1996), the Commission Staff has steadfastly refused to make the corrections and revisions necessary to provide truly effective, workable competition that will likely provide real benefits for the State. As a result, APS requests the Arizona Corporation Commission ("Commission") to reject the Staff's "Proposed Order" as filed on December 13, 1996¹ and instead, the Commission

¹Staff presumably used the term "Proposed Order" in recognition of the fact that only a Hearing Officer can submit a "Recommended Order." See A.A.C. R14-3-110. However, the ability of Staff to tender a "Proposed Order" is contingent upon it being a "party." It is doubtful that anyone can be a "party" in a rule making proceeding. Moreover, the ability of "parties" to

1 should take this opportunity to issue a procedural order promptly scheduling the necessary
2 evidentiary hearings APS and others have requested so that the competition "framework" desired
3 by the Commission can be properly constructed and retail access can begin by 1999.

4 Should the Commission nonetheless vote to approve the deficient Proposed Order, then
5 APS urges that the effective date of that Order and the rules be stayed thirty (30) days. This will
6 allow the Commission sufficient time to consider inevitable applications for rehearing.

7 APS incorporates herein its previous comments and testimony on the Proposed Rules and
8 so will not repeat them again. Instead, the Company will highlight some of its principal objections
9 that are further underscored by language contained in the Staff's Proposed Order.

10 I.

11 **THE LEGAL "ANALYSIS" CONTAINED**
12 **IN THE PROPOSED ORDER SHOULD BE STRICKEN**

13 During the two years in which Staff's lawyers have declined to discuss their legal
14 analysis, APS has been unable to discern Staff's position on many of the fundamental legal
15 issues that APS and other parties have repeatedly brought to the Commission's attention. For
16 example, on November 15, 1996, APS submitted a number of data requests to Staff asking for
17 background on the Proposed Rules. On more than one occasion Staff responded that questions
18 regarding legal issues were "attorney work product which Staff claims is privileged." (See Staff's
19 December 2, 1996 Response.)

20 However, Staff now asks the Commission to adopt Staff's legal analysis on a variety of
21 key issues, such as compensation for loss of its exclusive CC&Ns, recovery of stranded costs,
22 authority of the Commission to issue competitive CC&Ns, ripeness for judicial review, due
23 process and equal protection issues, etc. Staff has thereby essentially "gutted" proposed R14-2-
24 1616. That provision of the Proposed Rules creates an industry working group to "identify,

25 _____
26 submit "Proposed Orders" does not change the affirmative obligation of the presiding Hearing
Officer(s) under A.A.C. R14-3-110(B) to make a recommendation to the Commission.

1 analyze and provide recommendations to the Commission on legal issues relative to these
2 Rules" (R14-2-1616). It would be highly prejudicial and grossly unfair to have only Staff's
3 views adopted by the Commission before the aforementioned legal working group has even been
4 created.

5 In addition, Staff's legal analysis is just plain wrong in most cases. For example, Staff
6 would have the Commission conclude that it has the "authority to grant competitive CC&N's,
7 when the public interest demands it" (Proposed Order at 38). Such a position has been
8 unequivocally and without qualification rejected by both the Arizona Supreme Court and the
9 Court of Appeals as discussed in APS's previous filings. (See, e.g., APS' September 12, 1996
10 Comments). Staff does not even mention the definitive Arizona Supreme Court decisions on
11 this point, but instead refers to two ancient Arizona cases that are factually and procedurally
12 distinguishable and that provide absolutely no support for the Staff position.

13 As another example, Staff asks the Commission to conclude that "we are not convinced
14 that the regulatory policy of the State has formed any sort of contract with the Affected Utilities.
15 It appears that the former "policy" of regulated monopoly was just that--a policy, made with no
16 intent to bind the State or the Commission." (Proposed Order at 36). None of the cases cited
17 by Staff in its Proposed Order support such a "revisionist" view of Arizona law nor do they
18 contradict the very clear Arizona Supreme Court pronouncements that the State, acting through
19 both the Legislature and the Commission, has formed a binding contract with utilities such as
20 APS that simply cannot be unilaterally abrogated by the Commission, without implementing
21 legislation and the payment of adequate compensation. (See, e.g., APS September 12, 1996
22 Comments).² Moreover, the Commission should recall that the United States Supreme Court

23
24 ²In Application of Trico Electric Co-operative, Inc., 92 Ariz. 373, 380, 377 P.2d 309, the
Supreme Court stated:

25 In the performance of its duties with respect to public service corporations the
26 Commission acts as an agency of the State. By the issuance of a certificate of
convenience and necessity to a public service corporation the State in effect

1 has recently and soundly rejected a similar contention by a regulatory agency that it could
2 "change the rules of the game" at will and shift the cost of regulatory changes to its contractual
3 partners with impunity. See United States v. Winstar, 116 S.Ct. 2432 (1996).

4 Thus, the Commission should reject Staff's legal conclusions as both incorrect statements
5 of the law, and premature in light of the Commission's intent to receive the recommendations of
6 its legal Working Group on these very issues.

7 II.

8 THE STAFF ECONOMIC IMPACT STATEMENT 9 IS LEGALLY INADEQUATE

10 The Staff excuse for failing to prepare an adequate economic impact statement is as
11 inexplicable as it is disturbing. Staff advances the technically correct but irrelevant argument
12 that Commission rule-making is exempt from review by the Governor's Regulatory Review
13 Council. However, the Commission is legally mandated to "adopt substantially similar review
14 procedures, including the preparation of an economic impact statement and a statement of the
15 effect of the rule on small business." A.R.S. §41-1057(2). This is precisely what APS and
16 others have alleged that Staff failed to do.

17 Staff has failed to do a quantitative economic impact study to reasonably apprise the
18 Commission of the potentially significant impacts associated with the introduction of retail
19 competition under the Proposed Order due to their incorrect conclusion that it would not be
20 possible to do an adequate quantitative analysis. As APS has pointed out, many parties and
21 agencies around the country have diligently undertaken the task of estimating the consequences
22 of retail access on state economies and customer groups. Staff should be required to adequately
23 fulfill this legal requirement.

24
25 _____
26 contracts that if the certificate holder will make adequate investment and render
competent and adequate service, he may have the privilege of a monopoly as
against any other private utility.

1 Because Staff declined to undertake any quantitative impact analysis, APS introduced the
2 testimony of Elliot Pollack, a noted Arizona economist, to demonstrate that a quantitative
3 analysis can be performed at this time, and that there exists the possibility of significant state
4 and local tax revenue losses under the Commission's competition rules.³ Staff's failure to
5 provide an adequate economic impact study does not give the Commission, affected parties and
6 the consumer of Arizona adequate information to justify the adoption of these Proposed Rules.⁴

7
8 **III.**

9 **THE PROPOSED ORDER FAILS TO**
10 **RECOGNIZE THE NEED FOR LEGISLATIVE**
11 **AND/OR CONSTITUTIONAL CHANGES**
12 **TO IMPLEMENT RETAIL COMPETITION**

13 Neither the Commission nor the Staff has yet presented any legal authority for the
14 proposition that the Commission can, simply by regulation, reverse the legislatively created
15 policy of regulated monopoly for electric utilities or issue CC&Ns not authorized by statute.
16 Nor does the Proposed Order acknowledge that the Arizona Legislature has a critical role to
17 play, not only with regard to the shift in the fundamental public policy of the past eighty years,
18 but in providing the Commission with the legal tools to supervise and control transition to full
19 competition without either impairing that competition with needless regulatory restrictions or
20 burdening incumbent providers with disparate regulatory treatment.

21 Most telling on this point is the response APS received to its discovery request to the
22 Commission Staff. APS asked the Staff "What specific Federal or State legislative or
23 Constitutional changes, if any, does the Staff believe are necessary or desirable to fully

24 ³Mr. Pollack's conclusions were certainly not unique to Arizona. Other studies have
25 warned of similar impacts in other states. See, e.g., the October, 1996 report from Deloitte Touche
26 entitled "Federal, State and Local Tax Implications of Electric Utility Restructuring."

⁴ Even though APS pre-filed the testimony of Mr. Pollack with substantial supporting
documentation for its conclusions, Staff has never contacted APS or Mr. Pollack to learn more
about his analysis, to discuss his methodology and conclusions in more detail, or to attempt a
collaborative effort to investigate further the impacts of competition in Arizona.

1 implement the Proposed Rule?" On December 2, 1996, Staff responded with the answer: "This
2 question asks for attorney work product which Staff claims is privileged." In other words, Staff
3 refuses to divulge to the Commission or to any other party the degree and extent of legislative
4 changes necessary to fully implement its competition rules. APS's initial review of the many
5 volumes of Arizona statutes reveal there are at least 115 separate Arizona statutes (not counting
6 Constitutional provisions or implementing regulations) that deal with public utilities, and which
7 will have to be reviewed and possibly modified in order to provide for the fair and efficient
8 competition the Commission envisions and to deal with the thorny "level playing field" and
9 Commission jurisdiction issues related to currently non-regulated utilities.

10 APS urges the Commission to defer adopting any competition rules until it fully
11 understands and makes appropriate provisions for the substantial legislative and/or
12 Constitutional changes required for retail access.

13 IV.

14 THE "MITIGATION" STANDARD 15 IN PROPOSED RULE R14-2-607 16 SHOULD BE MODIFIED

17 At page 45 of the Proposed Order, Staff agrees that APS's request to have the mitigation
18 standard changed to one of reasonableness may be "more workable than the initial wording"
19 and did not object to such a change. However, the Proposed Order retains the existing standard
20 without the change requested by APS and apparently accepted by Staff. APS' November 8,
21 1996 comments demonstrated why the current wording of the Proposed Rule suggests an
22 impermissible standard of perfection, measured by hindsight, that is inconsistent with the
23 judicial standards of mitigation -- a standard based on reasonableness that must be judged in
24 light of what was known at the time of the decision. APS therefore asks the Commission to
25 modify the mitigation standard to one of reasonableness under the circumstances.

26 Moreover, the Proposed Order now states that the Commission "envisions Affected
Utilities utilizing a wide variety of methods of mitigate or offset Stranded Costs, including

1 methods unrelated to energy activities.” (Proposed Order at 46). This language should be
2 stricken from the Order because it could be read as requiring the Company to engage in a
3 variety of unregulated, non-energy activities solely for the purpose of attempting to mitigate
4 stranded costs, the recovery of which it is otherwise guaranteed. Aside from the many
5 practical difficulties associated with implementing such an unlawfully vague and intrusive
6 mandate,⁵ there has certainly been no evidence offered by Staff that a new round of prudence
7 reviews, in which the Commission attempts to “second guess” utility management decisions in
8 the competitive marketplace, will produce any public interest benefits.

9
10 **V.**

11 **THE PROPOSED AMENDMENTS REGARDING**
12 **UNREGULATED ELECTRIC UTILITIES**
13 **STILL REQUIRE CLARIFICATION**

14 The Proposed Rules are now clear that Arizona electric utilities unregulated by the
15 Commission (such as SRP or tribal utilities) are not allowed under the Proposed Rules to
16 acquire competitive CC&Ns in the territories of incumbent public service corporations: “... nor
17 shall Arizona electric utilities which are not Affected Utilities be able to compete for sales in the
18 service territories of the Affected Utilities.” (See proposed R14-2-1611(A)). However, the
19 Proposed Order adds new subsections (D) and (E) to R14-2-1611 which describe the
20 circumstances under which such non-jurisdictional utilities may open their own territories to
21 competition under provisions similar to those contained in the Proposed Order. The provisions
22 of new subsections (D) and (E) are sufficiently murky concerning the Commission’s intended
23 role in regulating activities within the service territories of those non-jurisdictional entities that
24 further clarification may be warranted to delineate how and to what extent the Commission will

25 ⁵For example, what business activities must a utility consider, how much money must it
26 commit to such “mitigation,” how is the decision to proceed to be made, is pre-approval by the
Commission required, will customers advance the necessary capital and operational funds, will
any resulting losses be added to recoverable stranded costs, etc.

1 assert authority over sales in those areas and whether such activities can even be authorized by
2 Commission regulation, rather than by implementing state or Constitutional changes.

3 VI

4 CONCLUSION

5 Perhaps the most disappointing aspect of the Proposed Order is its failure to even
6 acknowledge, much less discuss, the substantial testimony submitted by recognized experts with
7 "hands-on" experience in actually restructuring the electric utility industry in other
8 jurisdictions. These experts were unanimous in their verdict that the rules reflected in the
9 Proposed Order are dangerously ambiguous and incomplete on critical issues, will likely incite
10 needless and expensive litigation that will delay retail access, and are ultimately doomed to
11 failure unless the Commission first solves the many structural, reliability, technical, economic,
12 logistical and equity issues described in detail in their testimony and recognized (albeit
13 sometimes belatedly) by regulators elsewhere attempting the same task. APS again asks the
14 Commission to take the time to resolve the issues and provide the solid framework necessary to
15 ensure effective competition by 1999.

16 RESPECTFULLY SUBMITTED this 20th day of December, 1996.

17 SNELL & WILMER L.L.P.

18 by


19 Steven M. Wheeler, Esq.

20 Thomas L. Mumaw, Esq.

21 One Arizona Center

22 Phoenix, AZ 85004

23 Attorneys for Arizona Public Service Company
24 and

25 Herbert I. Zinn, Esq.

26 Senior Attorney

Law Department

Arizona Public Service Company

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

CERTIFICATE OF SERVICE

The original and ten (10) copies of the foregoing document were filed with the Arizona Corporation Commission on this 20th day of December, 1996, and service was completed by mailing, hand-delivering or faxing a copy of the foregoing document this 20th day of December, 1996, to all parties of record herein.



CHESTER E. LEWIS

Snell & Wilmer
L.L.P.
LAW OFFICES
One Arizona Center
Phoenix, AZ 85004-0001
(602) 382-6000

CERTIFICATE OF SERVICE

For Parties of Record in Docket No. U-0000-94-165

COPIES of the foregoing were mailed and/or delivered on this 20th day of December, 1996, to the following:

Gary Yaquinto, Director
Utilities Division
ARIZONA CORPORATION COMMISSION
1200 West Washington Street
Phoenix, AZ 85007

Renz D. Jennings, Chairman
ARIZONA CORPORATION COMMISSION
1200 West Washington Street
Phoenix, AZ 85007

Paul A. Bullis, Chief Counsel
Legal Division
ARIZONA CORPORATION COMMISSION
1200 West Washington Street
Phoenix, AZ 85007

Jerry Rudibaugh
Chief Hearing Officer
ARIZONA CORPORATION COMMISSION
1200 West Washington Street
Phoenix, AZ 85007

Marcia Weeks, Commissioner
ARIZONA CORPORATION COMMISSION
1200 West Washington Street
Phoenix, AZ 85007

David Berry
Utilities Division
ARIZONA CORPORATION COMMISSION
1200 West Washington Street
Phoenix, AZ 85007

Carl Kunasek
Commissioner
ARIZONA CORPORATION COMMISSION
1200 W. Washington
Phoenix, Arizona 85007

Copies of the foregoing mailed this 20th day of December 1996 to:

Greg Patterson
RESIDENTIAL UTILITY CONSUMER OFFICE
2828 N. Central, Suite 1200
Phoenix, Arizona 85004

Ms. Karen Glennon
19037 N. 44th Avenue
Glendale, Arizona 85308

Louis A. Stahl, Esq.
STREICH LANG
Renaissance One
Two N. Central Avenue
Phoenix, Arizona 85004

Jane D. Alfano, Manager, Legal Services
Diane M. Evans, Senior Attorney
SALT RIVER PROJECT AGRICULTURAL
IMPROVEMENT & POWER DISTRICT
P.O. Box 52025 - PAB 300
Phoenix, Arizona 85072-2025

Bradley Carroll
Legal Department
TUCSON ELECTRIC POWER COMPANY
220 West Sixth Street
P.O. Box 711
Tucson, Arizona 85701

AJO IMPROVEMENT COMPANY
P.O. Drawer 9
Ajo, Arizona 85321

ARIZONA ELECTRIC POWER COOPERATIVE, INC.
P.O. Box 670
Benson, Arizona 85602

Betty K. Pruitt
ACAA Energy Coordinator
ARIZONA COMMUNITY ACTION ASSOCIATION
67 E. Weldon, Suite 310
Phoenix, Arizona 85012

Michael M. Grant, Esq.
JOHNSTON, MAYNARD, GRANT & PARKER
3200 N. Central Avenue, Suite 2300
Phoenix, Arizona 85012
Attorneys for Arizona Electric Power
Cooperative, Inc. (AEPCO)

Michael A. Curtis
2712 N. Seventh Street
Phoenix, Arizona 85006-1003
Attorneys for Arizona Municipal Power
Users' Association

Walter W. Meek
ARIZONA UTILITIES INVESTORS ASSOCIATION
3030 N. Central Avenue, Suite 506
Phoenix, Arizona 85012

Beth Ann Burns, Senior Counsel
CITIZENS UTILITIES COMPANY - AZ
2901 N. Central Avenue, Suite 1660
Phoenix, Arizona 85012-2736

Bruce Driver, Senior Counsel
Eric Blank, Esq.
LAND & WATER FUND OF THE ROCKIES
Law Fund Energy Project
2260 Baseline, Suite 200
Boulder, CO 80302

GRAHAM COUNTY ELECTRIC COOPERATIVE, INC.
P.O. Box Drawer B
Pima, Arizona 85543

DUNCAN VALLEY ELECTRIC COOPERATIVE, INC.
P.O. Box 440
Duncan, Arizona 85534

MOHAVE ELECTRIC COOPERATIVE, INC.
P.O. Box 1045
Bullhead City, AZ 86430

MORENCI WATER & ELECTRIC COMPANY
P.O. Box 68
Morenci, Arizona 85540

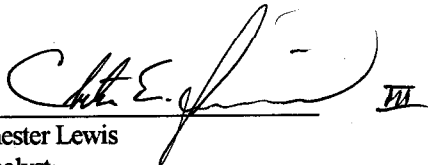
NAVOPACHE ELECTRIC COOPERATIVE, INC.
P.O. Box 820
Lakeside, Arizona 85929

SULPHUR SPRINGS VALLEY ELECTRIC COOPERATIVE
P.O. Box 820
Wilcox, Arizona 85644

TRICO ELECTRIC COOPERATIVE, INC.
P.O. Box 35970
Tucson, Arizona 85740

Doug Nelson
7000 North 16th Street
Suite 120-307
Phoenix, Arizona 85020

By:


Chester Lewis
Analyst
Regulatory Services

h:\regaff\servlist\com94165.doc